No. 93-1340

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1994

UNITED STATES OF AMERICA, PETITIONER

v.

GARY MEZZANATTO

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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Respondent argues at length (Br. 5-20) that the text and legislative history of Rule 11(e)(6) of the Federal Rules of Criminal Procedure and Rule 410 of the Federal Rules of Evidence make clear that those rules give the defendant a right not to be impeached with statements he made during plea discussions. We conceded as much in our opening brief (U.S. Br. 11-12), and therefore respondent's textual and legislative history arguments are largely directed at establishing a proposition that is not at issue in this case. What *is* at issue is whether a defendant's agreement to give up his right under the rules is enforceable by the government. Respondent's analysis of the text and history of the rules does not establish that Congress intended to make such agreements unenforceable.

1. Respondent's first textual argument (Br. 5-6, 9-10, 16) is that Rules 11(e)(6) and 410 state that plea statements are inadmissible "[e]xcept as otherwise provided" in those rules, and that under *Crosby* v. *United States*, 113 S. Ct. 748 (1993), a court may not make a defendant's waiver of his rights an additional exception to those rules.

a. *Crosby* involved Fed. R. Crim. P. 43, which requires the defendant to be present at every stage of his trial "except as otherwise provided" by that rule. One of the "except[ions] * * * provided" by Rule 43 is that a defendant's presence is not required when he is "voluntarily absent after the trial has commenced." See Fed. R. Crim. P. 43(b)(1). A defendant's voluntary absence after the trial begins "operates as a waiver of his right to be present." *Crosby* v. *United States*, 113 S. Ct. at 751-752. The defendant in *Crosby* was tried and convicted in absentia after he failed to appear for the beginning of his trial. This Court reversed, rejecting the government's argument that the defendant's failure to appear for any part of the trial was a knowing waiver of his rights under Rule 43. *Crosby*, however, does not help respondent for two reasons.

First, Rule 43 itself describes the circumstances under which a defendant's failure to appear can be treated as a waiver of his right to be present. We argued in *Crosby* that a failure to appear also could be a waiver in other circumstances. The Court held, however, that the reference in Rule 43 to a single method of waiver, combined with the language "except as otherwise provided," indicated that no other type of waiver was contemplated. *Crosby*, 113 S. Ct. at 751.

There is no basis for a similar conclusion in this case. The Court rejected the government's waiver argument in *Crosby* only because one of the exceptions to Rule 43

is a form of waiver based on the same conduct—absence from trial—on which the government relied to argue for a broader waiver. Rules 11(e)(6) and 410, by contrast, do not provide that their impeachment protection may be waived only upon certain conditions; indeed, the rules do not speak at all to waiver. Thus, unlike Rule 43, the text of the rules at issue in this case gives no reason to conclude that the drafters considered and intended to displace, in whole or in part, the background principle that "[a] party may waive any provision * * * of a statute[] intended for his benefit." *Shutte* v. *Thompson*, 82 U.S. (15 Wall.) 151, 159 (1873).[1]

Second, the Court emphasized in *Crosby* that it would be difficult to infer a knowing waiver from the defendant's complete failure to appear at trial. When the defendant is present at the outset of the trial, the Court noted, his "initial presence serves to assure that any waiver is indeed knowing," *Crosby*, 113 S. Ct. at 752, because a defendant who flees in the middle of the trial is bound to know that the trial will continue in his absence. *Ibid.*, citing *Taylor* v. *United States*, 414 U.S. 17, 20 (1973). On the other hand, "[s]ince the notion that trial may be commenced in absentia still seems to shock most lawyers, it would hardly seem appropriate to impute knowledge that this will occur to their clients." *Crosby*, 113 S. Ct. at 752 (internal quotation marks omitted); see

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[1] See also *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985) ("We must assume that if Congress intended the substantive protection afforded by a given statute to include protection against waiver * * *, that intention will be deducible from text or legislative history."); *Silver* v. *New York Stock Exch.*, 373 U.S. 341, 362 n.14 (1963) (background principles of law, such as waiver, estoppel, or laches, ordinarily are "presum[ed] applicab[le]").

also *United States* v. *Deeb*, 13 F.3d 1532, 1535 (11th Cir. 1994).

Those considerations have no application here. Respondent did far more than engage in conduct that could, but need not, be interpreted as a waiver. Upon the advice of competent counsel, he entered into an agreement with the government that specifically permitted the government to use his statements to impeach any inconsistent version of events to which he might testify at a later trial. In light of his agreement, respondent has never claimed that his waiver was unknowing; his sole claim is that the right that he agreed to give up is inalienable, and that therefore the government is not entitled to the benefit of its bargain.[2] Nothing in *Crosby* supports that proposition.

b. Respondent's interpretation of the phrase "except as otherwise provided" cannot be reconciled with the accepted practice under other rules of evidence that contain similar or identical language. As we have noted (Br. 17-19), the Rules of Evidence also provide that "[h]earsay is not admissible except as provided" by rule. Fed. R. Evid. 802. If respondent's interpretations were correct, parties to litigation could not dispense with the

[2] Amici National Association of Criminal Defense Lawyers and California Attorneys for Criminal Justice (NACDL) challenge the adequacy of the record on the issue whether respondent's waiver was knowingly and intelligently made. NACDL Br. 27-30. That issue, however, was not the basis for the court of appeals' ruling. Moreover, that argument was not raised in the petition or the brief in opposition, and respondent expressly disclaims reliance on it. That issue is therefore not properly before the Court. See *United Parcel Service, Inc.* v. *Mitchell*, 451 U.S. 56, 60 n.2 (1981) (noting that the Court does not decide issues raised by amici that were not decided by the court of appeals or argued by the parties); *Bell* v. *Wolfish*, 441 U.S. 520, 531 n.13 (1979) (same).

personal appearance of a witness by agreeing to what the witness would say if he were called to testify. Under respondent's theory, that would be an impermissible agreement to introduce the affidavit of the witness, which is inadmissible hearsay. Yet agreements of that type are common practice in federal courts, where parties ordinarily are "give[n] * * * great freedom to waive rules or even to construct new procedures under the doctrine of stipulations." 21 Charles Alan Wright & Kenneth W. Graham, *Federal Practice and Procedure* § 5039, at 207 (1977).

Respondent contends (Br. 37-38) that stipulations should be distinguished from his agreement, because stipulations are usually entered into or ratified at trial, so that they are properly characterized as a species of forfeiture. Thus, respondent contends, stipulation practice sheds no light on whether rights provided by the Rules of Evidence are waivable. Stipulations, however, are frequently negotiated and signed before trial. Indeed, it would be poor trial strategy for any attorney who bears the burden of proof on an issue to wait until the trial to ascertain whether his opponent will agree to stipulate to the matter.[3] In any event, the fact that the

[3] There is no merit to respondent's argument (Br. 39-40) that, if his agreement is analogous to a stipulation, it is the type of "extra-judicial" stipulation that has been disfavored by commentators. Respondent's argument confuses stipulations reached outside of a *courtroom* with agreements made outside the context of a particular *case*. The latter are primarily agreements in which a party waives his rights in the same contract that creates a commercial relationship with another, before any litigation ensues and before the party who waives his rights can know of the specific litigation context in which his waiver will be invoked. As we explained in our opening brief (at 17 n.4), it is only the latter type of stipulations that are "extra-judicial" in the relevant sense.

Rules of Evidence and the Criminal Rules permit forfeiture of a defendant's claim that his plea statements are inadmissible is compelling evidence that that type of evidence is not invested with any special protection against a knowing and intelligent waiver. Whether a particular protection may be forfeited is a *harder* policy question for an evidentiary system than whether the same protection may be waived, because forfeiture operates even when the defendant and his counsel were not aware that there were legal grounds for excluding the evidence.[4]

Respondent errs in suggesting (Br. 11 n.9, 36-37) that an attorney who signs a stipulation proffered by his opponent before trial can nonetheless demand strict compliance with the rules (and preserve "error" for appellate review) simply by objecting at trial, and thereby require his opponent to produce the witness whose presence he had already agreed to excuse. No district court would countenance that tactic, and with good reason. Nothing in the Rules of Evidence in general, or in Rules 11(e)(6) and 410 in particular, can fairly be read to require that a district court permit a party to ambush his opponent by reneging on his pretrial

[4] Respondent notes that Section 1B1.8 of the Sentencing Guidelines provides that parties may agree to the admissibility of self-incriminating information provided pursuant to a cooperation agreement. The inclusion of a specific reference to the possibility of agreement, respondent argues, indicates that Rules 11(e)(6) and 410 must not be meant to permit such an agreement. The Rules and the Guidelines, however, are different bodies of law that were promulgated by different entities; the fact that the Sentencing Commission chose to refer specifically to the effect of agreement says little or nothing about what consequence should attach to the absence of specific reference to agreement in the Rules promulgated by Congress and this Court.

agreement in that fashion, or to obtain a benefit from his opponent by agreeing to waive the application of a rule, as respondent did, only to invoke the rule at trial when he thinks better of the bargain. As this Court noted in *Shutte* v. *Thompson*, *supra*, if a party induces his opponent to act in a certain way by appearing to waive his rights under a rule of evidence before trial, "he ought not to be permitted to raise the objections at all [at trial]. If he may, he is allowed to avail himself of what is substantially a fraud * * * and a court whose province it is to administer justice, will take care that on the trial of every cause neither party shall reap any advantage from his own fraud." 82 U.S. (15 Wall.) at 159.[5]

2. Respondent next contends (Br. 6-16) that Rules 11(e)(6) and 410 "were written in absolute, mandatory terms," and that a mandatory rule "must be followed," notwithstanding the wishes of the parties, unless the rule itself expressly authorizes waiver. This Court, however, has never held that statutory rights phrased in

[5] Respondent asserts that the government's agreement to devote the resources necessary to meeting with him and to explore his purported desire to cooperate with the government was "hardly consideration for a binding contract." Br. 32. As we have previously explained (U.S. Br. 26-27), that is not correct. Moreover, it was respondent who asked to meet with the prosecutor. He agreed to waive some of his rights under Rules 11(e)(6) and 410 because he thought the opportunity to persuade the prosecutor to use him against others was valuable. What is more, as Chief Judge Wallace observed, it was respondent who gave up little in the bargain. "By forfeiting his ability to provide inconsistent testimony at trial, the defendant has forsaken—or at least diminished—his 'right' to lie at some stage of the prosecution. The defendant who forsakes this 'right,' of course, has sacrificed nothing, as no defendant has the 'right' to provide false testimony." Pet. App. 14a (Wallace, J., dissenting), citing *Nix* v. *Whiteside*, 475 U.S. 157, 173 (1986).

"mandatory" terms are unwaivable unless Congress expressly states that their waiver is permitted. To the contrary, the default rule provides that a party may waive any constitutional or statutory provision intended for his benefit, see *Shutte* v. *Thompson*, *supra*; *Insurance Corp. of Ireland, Ltd.* v. *Compangnie des Bauxites de Guinee*, 456 U.S. 694, 703 (1982). Accordingly, even "[t]he most basic rights of criminal defendants are * * * subject to waiver." *Peretz* v. *United States*, 111 S. Ct. 2661, 2669 (1991). That a rule is framed in "mandatory" terms does not change that background principle. The Constitution uses mandatory and unqualified language to confer numerous rights that this Court has found subject to the general principle of waiver. Respondent contends that constitutional rights stand on a different footing, and echoes the reasoning of the court of appeals in urging (Br. 13-16) that this Court should make it more difficult for a defendant to waive rights conferred by statute than those conferred by the Constitution, because it is easier to change or repeal a statute than to amend the Constitution.

It would be anomalous to hold that less exacting standards apply to the waiver of constitutional rights than to the waiver of rights created by statute. See *Bank of Nova Scotia* v. *United States*, 487 U.S. 250, 256 (1988); see also *Peters* v. *Kiff*, 407 U.S. 493, 512 n.* (1972) (Burger, C.J., dissenting). In any event, respondent's contentions miss the point. Waivers of constitutional rights are given effect not because it is difficult to amend the Constitution, but because those rights are intended for "the protection of an accused," and "to deny him * * * the right to dispense with some of these safeguards * * * is to imprison a man in his privileges and call it the Constitution." *Adams* v. *United States ex rel. McCann*, 317 U.S. 269, 280 (1942). The same is true

of statutory rights, as this Court's decision in *Shutte* v. *Thompson*, *supra*, illustrates. The evidentiary rule at issue there was prescribed by a statute that used mandatory words to prescribe the required oath and other procedures. See Act of Sept. 24, 1789, ch. 20, § 30, 1 Stat. 88-90. Although those procedures were not observed in the case, this Court nonetheless concluded that "it is obvious that all the provisions made in the statute * * * were introduced for the protection of the party against whom the testimony of the witness is to be used. It is not to be doubted that he may waive them." *Shutte* v. *Thompson*, 82 U.S. (15 Wall.) at 159.

Respondent seeks to avoid this analysis by arguing that Rules 11(e)(6) and 410 were not intended for the benefit of criminal defendants, but were designed to prescribe an inflexible process in order to encourage plea negotiations. Br. 12. In respondent's view, the rules "are not so much 'rights' as they are rules to 'guarantee fair procedure.'" *Ibid.*; see also NACDL Br. 22. It is true, of course, that rules of evidence generally reflect societal consensus that certain procedures are fair. That point does not, however, support respondent's claim that the party who would benefit from application of a particular rule may not waive his right to invoke it in a particular case. Respondent's claim is especially implausible with respect to rules, like the plea bargaining rules at issue here, that provide that certain types of evidence are inadmissible against criminal defendants. It has always been understood that such exclusionary rules reflect "the policy of the law in general and the Rules of Evidence in particular of providing special protection to defendants in criminal cases." *Green* v. *Bock Laundry Machine Co.*, 490 U.S. 504, 529 (1989) (Scalia, J., concurring in judgment); see also *id.* at 522-524 (majority opinion).

3. Respondent derives no greater support from the legislative history of Rules 11(e)(6) and 410. Br. 16-20. Those materials confirm that the rules do not authorize the use of plea statements for impeachment, but they do not speak at all to the propositions that respondent must establish to prevail—*i.e.*, that Congress specifically considered the subject of waiver and that it intended to displace the background rule that permits a party to waive any provision intended for his benefit.

That Rules 11(e)(6) and 410 were intended to promote plea bargaining, as respondent emphasizes, does not establish that intention. Plea bargaining is more likely to occur when the parties themselves are permitted to agree on the terms on which it will proceed. Respondent contends that "common sense, alone, tells us" that waiver "acts as a brake, not as a facilitator, to the plea-bargaining process," because "requiring a defendant to waive the impeachment protection * * * before he even begins discussing the case with the government would make any defendant think twice about engaging in a plea-negotiation." Br. 23 n.17. Respondent, however, was not "required" to do anything. He sought out the prosecutor, and he entered into a voluntary agreement with the government upon the advice of competent counsel. More importantly, there can be no bargain without the concurrence of two parties. The best evidence of what ground rules are likely to promote bargaining is furnished by the rules to which the parties themselves have agreed as conducive to that end. That respondent later found reason to be unhappy with his bargain does not make the bargain one he should not have been permitted to enter. The fact that Congress rejected an impeachment exception to Rules 11(e)(6) and 410 does not establish that Congress intended to forbid waiver of that protection. All that can be inferred from the rejection of

the impeachment exception is that Congress gave the defendant the right to preclude the government from using his statements in that manner. It does not follow that Congress intended that right to be inalienable, much less that Congress expressed that intention in terms sufficiently clear to override the longstanding principle that a party may waive any provision intended for his benefit.

4. Respondent also contends (Br. 20-36) that his agreement violates the public policy in favor of plea bargaining. We acknowledged in our opening brief that the fact that a right is personal and may be waived does not mean that a court must accept a waiver of that right if to do so would offend public policy. See *Wheat* v. *United States*, 486 U.S. 153, 160-162 (1988). We also acknowledged that a defendant's agreement waiving his rights is subject to avoidance if a defendant can establish any recognized defense to the enforcement of contractual obligations, including the defense that the agreement violates public policy derived from "laws and legal precedents and not from general considerations of supposed public interests." *W.R. Grace & Co.* v. *Local Union 759, Int'l Union of United Rubber Workers*, 461 U.S. 757, 766 (1983) (quoting *Muschany* v. *United States*, 324 U.S. 49, 66 (1945)). Respondent's public policy contentions, however, largely consist of repeating his unsupported claim that Rules 11(e)(6) and 410 forbid any waiver of the rights they confer. Respondent also argues that it would be inequitable to enforce his agreement because the government's superior bargaining power might be abused. Those contentions fall far short of establishing that respondent's voluntary agreement is unenforceable.

a. As we noted in our opening brief (at 24-25), discussions about cooperation may or may not develop

into negotiations about a plea bargain. For that reason, meetings such as respondent had with the prosecutor in this case are not always "plea discussions with an attorney for the prosecuting authority." Fed. R. Evid. 410(4). Agreements outlining the consequences for admissibility of such proffer sessions therefore foster desirable predictability for both parties and serve to avoid wasteful collateral litigation about whether the meeting, as it actually developed, was in fact a "plea bargaining" session. Respondent does not address our argument, but simply argues his position as if a proffer of cooperation were at the very core of the type of "plea bargaining" that Congress intended to address when it enacted Rules 11(e)(6) and 410. Nor does respondent persuasively address our submission (U.S. Br. 27-28) that the cooperation context, and the uses to which the government puts the information it obtains through cooperation, give the government a compelling interest in the truthfulness of a defendant's proffer that goes well beyond the government's interest in not being lied to in an ordinary plea bargain.[6]

Respondent contends instead that it is "inherently unfair and coercive" (Br. 25-26) to hold him to his agreement, because defendants who face the punishments prescribed by the Sentencing Guidelines can obtain leniency only by cooperating with the government, and therefore "the current sentencing laws make[] for a gross disparity in the relative bargaining position[s] of the prosecutor and defendant." Br. 26; see

[6] The cooperation context alone accounts for the prosecutor's need to meet with the defendant to assess his credibility and the value of his information. A prosecutor who wishes only to engage in plea bargaining can work out a deal with the defendant's counsel without hearing from the defendant at all.

also NACDL Br. 13-16. That type of disparity in bargaining power, however, does not make respondent's agreement unfair in a sense relevant to any recognized defense to contractual liability.[7] Indeed, a parallel argument could be made with respect to traditional forms of plea bargaining, since a defendant whose guilt makes conviction highly likely may view himself as "coerced" in the sense of having few and unpalatable choices at the bargaining table. See Robert E. Scott & William J. Stuntz, *Plea Bargaining As Contract*, 101 Yale L.J. 1909, 1919-1921 (1992). Nonetheless, the law "has resolutely rejected" that argument, *id.* at 1920, and this Court has always proceeded on the assumption that the strength of the government's case is no basis for finding an improper disparity in bargaining power between the government and the defendant. See, *e.g.*, *Bordenkircher* v. *Hayes*, 434 U.S. 357, 362 (1978). See also *Alabama* v. *Smith*, 490 U.S. 794, 802-803 (1989); *Corbitt* v. *New Jersey*, 439 U.S. 212, 218-221 (1978); *Brady* v. *United States*, 397 U.S. 742, 750, 756-757 (1970).

[7] Respondent's argument sounds some of the themes raised by the contractual defenses of duress and unconscionability. Like other recognized defenses, duress and unconscionability would of course be available to challenge the validity of any specific agreement in which a defendant has waived his rights, where the defendant is able to make the demanding showing on which the law of contracts conditions their applicability. See generally ALI, Restatement (Second) of Contracts §§ 174-177 (1981) (duress); *id.* § 208 (unconscionability); *Hume* v. *United States*, 132 U.S. 406 (1889). Respondent never claimed below, however, that the circumstances of his case called for application of those defenses to contractual liability, or that he could meet the elements of either of them. His claim has been, and remains, that the nature of the right he gave up by itself requires invalidation of similar agreements in all circumstances.

The coercion argument is no more persuasive in the cooperation context than with respect to traditional forms of plea bargaining. Congress and the Sentencing Commission gave prosecutors nearly unreviewable discretion to reward a defendant's cooperation, see *Wade* v. *United States*, 112 S. Ct. 1840 (1992), because prosecutors are best situated to judge what information is valuable in the investigation or prosecution of others. A defendant has no "right" to a substantial assistance motion.[8] When the prosecutor withholds a substantial assistance motion, the consequence is that the defendant receives the sentence that Congress and the Sentencing Commission determined to be appropriate for his offense and criminal history. Cf. *Singer* v. *United States*, 380 U.S. 24, 36 (1965). Whatever "coercive" effect that sentence exerts, it is the result of the defendant's own criminality, not the product of any improper conduct on the part of the prosecutor.

b. Respondent also contends that proffer agreements can be abused by prosecutors who will agree to hear a proffer from the defendant solely in order better to prepare their cases with no true intent to explore the defendant's potential as a cooperating witness. For several reasons, that claim cannot support the broad *per se* prohibition sought by respondent.

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[8] For that reason, respondent is wrong to argue that defendants who agree to cooperate with the government in order to obtain a substantial assistance motion should not "be required to jeopardize their defense." Br. 25. The government may fairly ask for the strongest available assurances that the testimony on which a putative witness would send others to jail is not a tailored version of the events. Nothing in the plea bargaining rules entitles a defendant to cooperate with the government half-way—"to ride with the cops and cheer for the robbers." *Rankin* v. *McPherson*, 483 U.S. 378, 394 (1987) (Scalia, J., dissenting).

As this Court has repeatedly recognized, "in the absence of clear evidence to the contrary, courts presume that [prosecutors] have properly discharged their official duties." *United States* v. *Chemical Foundation, Inc.*, 272 U.S. 1, 14-15 (1926). See also *Town of Newton* v. *Rumery*, 480 U.S. 386, 395-397 (1987); *United States* v. *Dotterweich*, 320 U.S. 277, 285 (1943). The present context is particularly unsuited for an exception to that principle. When prosecutors meet with a witness who has proffered his cooperation, the prospective witness is almost invariably represented by counsel (as respondent was) who advises him on the wisdom of the agreement proposed by the government, and who ordinarily is present during the debriefing by the prosecutor (as respondent's counsel was) and can therefore protect the witness against any danger of overreaching.

Moreover, the prosecutor has a strong interest in encouraging the cooperation of defendants and rewarding defendants who provide substantial assistance. The prosecutor's misuse of proffer agreements in the manner posited by respondent, like the prosecutor's failure to make a substantial assistance motion on behalf of those defendants who have provided significant assistance, is likely to impair the effectiveness of the prosecutor's efforts to persuade other defendants to cooperate. Because prosecutors need the testimony and leads provided by cooperating witnesses, no prudent prosecutor can afford to engage in the improper conduct that respondent fears.

To the extent that a prosecutor in a particular case abuses the process by entering into a proffer agreement with no intention of discharging his part of the bargain in good faith, or by misrepresenting his intentions to the defendant and his counsel, contract law provides

adequate remedies without the need for the *per se* rule of invalidity sought by petitioner. As with other areas in which the law assumes that prosecutors will discharge their duties properly, see, *e.g.*, *Wade* v. *United States*, 112 S. Ct. at 1843-1844, a defendant who makes a substantial preliminary showing to the contrary can obtain discovery on his claim and a hearing. If the evidence warrants a finding that the prosecutor procured the defendant's waiver of his impeachment rights by fraud or misrepresentation, the district court may properly relieve the defendant of his obligations under the agreement. See ALI, Restatement (Second) of Contracts §§ 159-173 (1981).

Respondent and his amici suggest that the prosecutor in this case engaged in that type of misconduct, because respondent was asked primarily about his own crime rather than about the activities of others. Br. 32-35; NACDL Br. 24-27. As respondent himself acknowledges, however, "[t]he very best information, information bearing the most indicia of reliability, is based upon a defendant's personal involvement and association with the criminal conduct under investigation. Thus, the most helpful proffer is necessarily that which incriminates or implicates the defendant in the suspected criminal activity." Br. 24. Moreover, because the prosecutor needs to satisfy himself that a prospective witness is being truthful, and that he would hold up well under cross-examination if he were to testify for the government, there is nothing untoward in the prosecutor's use of "interrogation technique[s]" (NACDL Br. 26; Resp. Br. 33) to attempt to shake the witness's story, or to do so with matters (such as information involving the witness's own crime) that the prosecutor can easily verify through other sources. Finally, as respondent's own statement of the case

reflects, the prosecutor's questions did in fact relate to the participation of another person in the crimes under investigation—one "Uncle Bob," who purportedly supplied respondent with the methamphetamine that he delivered to the undercover agent. Br. 2.

c. Respondent does not dispute that the agreement invalidated by the Ninth Circuit advances the compelling interest in the truthfinding function of criminal trials, because it discourages a defendant from "affirmatively resort[ing] to perjurious testimony in reliance on the Government's disability to challenge his credibility." *James* v. *Illinois*, 493 U.S. 307, 312 (1990) (quoting *Walder* v. *United States*, 347 U.S. 62, 65 (1954)). Respondent faults us (Br. 29-30), however, for "undervalu[ing] existing mechanisms" that could adequately serve that interest, such as the prosecutor's right not to seek a sentence reduction for a defendant who lies and the court's ability, in appropriate cases, to enhance the defendant's sentence under the Guidelines provisions for obstruction of justice. See Guidelines § 3C1.1 (Nov. 1993); *United States* v. *Dunnigan*, 113 S. Ct. 1111 (1993).

Respondent's argument is flawed. A defendant who is willing to commit perjury at trial does so in order to avoid *conviction*, and if his perjury is successful no question as to the probable severity of his *sentence* can possibly arise. When the defendant has knowingly agreed to let the government use his proffer for impeachment, and those statements are inconsistent with the defendant's trial testimony, there is no good reason to keep that inconsistency from the jury, for the additional information tends to increase the reliability of the verdict. See *Jenkins* v. *Anderson*, 447 U.S. 231, 238 (1980). Giving effect to the waiver challenged by respondent therefore is consistent with the fundamental

canon that evidentiary rules should "be construed to secure fairness in administration * * * to the end that the truth may be ascertained and proceedings justly determined." Fed. R. Evid. 102; see also Fed. R. Crim. P. 2.

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For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

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